A **YAM RAJA DATO' SERI HJ IZZUDDIN ISKANDAR SHAH IBNI ALMARHUM SULTAN IDRIS A'FIFULLAH SHAH**

v.

B **DEWAN NEGARA PERAK, NEGERI PERAK & ANOR**

HIGH COURT MALAYA, IPOH
ABDUL KADIR MUSA J
[APPLICATION FOR JUDICIAL REVIEW NO: 25-39-2006]
C 30 JANUARY 2008

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for leave to apply for order of certiorari - Decision to remove applicant's royal title - Whether decision was made by State Senate or Sultan - Whether decision reviewable - Federal Constitution, arts. 7, 42(1), 71(1), 181 - Perak State Constitution, arts. 10, 25, 54(1), 62, 63, 64*

D

BANKRUPTCY: *Capacity of bankrupt - Application - Whether undischarged bankrupt had locus to bring application for leave for order of certiorari - Whether certiorari application was action for damages - Whether Official Assignee's sanction necessary - Bankruptcy Act 1967, s. 38(1)(a)*

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The applicant was stripped of the title 'Raja Kecil Besar Perak' following impeachment proceedings in the Perak State Senate under art. 54(1)(d) of the Perak State Constitution ('Perak Constitution') on the grounds of his bankruptcy.

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The applicant contended that the Senate's impeachment proceedings and decision of 25 November 2006 were in conflict with art. 7 of the Federal Constitution ('Federal Constitution') as art. 54(1)(d) of the Perak Constitution was enacted to have a retrospective effect. As para (d) did not exist on 27 March 1990, the date the applicant was adjudged a bankrupt, it was his contention that art. 7 of the Federal Constitution, which prohibited retrospective application of laws, shielded him from such impeachment.

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The applicant applied for leave under O. 53 r. (1)(1) of the Rules of the High Court 1980 ("RHC") to obtain an order *certiorari* under O. 53 r. (3)(2) of the RHC for the purposes of quashing the Senate's decision. Among the issues before the court were whether the applicant was an 'incompetent person' within

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s. 38(1)(a) of the Bankruptcy Act 1967 ('the Bankruptcy Act') being an undischarged bankrupt who had not obtained the Official Assignee's sanction to bring this application. A

Held (dismissing the application with costs):

(1) In order to fall within the exception to s. 38(1)(a) of the Bankruptcy Act, the applicant's action must be 'an action for damages in respect of injury to his person'. There was no evidence that the claim was 'an action for damages' even though all parties agreed that he had suffered injury to his person within the context of s. 38(1)(a). The damage claimed by the applicant must be in the nature of pecuniary compensation whereas the damage here was more in the nature of *damnum absque injuria*, namely a hurt or inconvenience which inflicts no actionable wrong or damage. (paras 4 & 5) B C D

(2) As the applicant was, until 14 June 2007, an undischarged bankrupt, and the application was without the Official Assignee's sanction and was not an action for damages, the applicant lacked *locus standi*, which was not just a formality but went to the capacity of the intended litigant. Without such capacity the court did not have the necessary jurisdiction to hear the application and the question of whether the application for an order of *certiorari* had merit or not was irrelevant. (paras 6 & 7) E F

Obiter:

(1) Article 7 of the Federal Constitution speaks of protection against retrospective criminal laws and repeated trials of criminal offences and not civil laws. The Bankruptcy Act is a civil law and as such, art. 7 did not apply. (para 27) G

(2) If the applicant had initiated positive steps to write to the Official Assignee for its sanction and received a positive reply after the permitted time to file for leave under O. 53 r. (1) of the RHC, he could then apply to the court for an extension of time to file his application. On the other hand, if the Official Assignee's response was not favourable to him or there was no response at all, then and only then, could the applicant equitably apply to the court for the exemption of the aforesaid sanction, and/or an extension of time. (para 9) H I

(3) The fifth heading of the application's intitulement which refers to arts. 63 and 64 of the Perak Constitution in relation to the special and advisory jurisdiction of the Federal Court, gives the court another ground to refuse the application without going into the merits of the application as neither the applicant, respondents nor the Sultan of Perak had applied to refer a question to the Federal Court about the Perak Constitution. It could be construed that the applicant was asking the court to direct the Sultan of Perak to refer the application to the Federal Court and the court should not allow itself to be used as a public platform for canvassing such a request. (paras 13 & 14)

(4) Royal prerogative can only be exercised by a sovereign personally and such exercise is non-justiciable *ab initio*, as reflected by art. 181 of the Federal Constitution. Only the Sultan of Perak can confer any title and dignity within Perak State as prescribed by art. 25 of the Perak Constitution. Therefore the question of issuance of leave for an order of *certiorari* can never be applied for in ordinary court of law. (paras 19 & 20)

(5) Article 54(1) of the Perak Constitution is clear that the final decision to impeach and degrade the applicant's title lies with the Sultan of Perak who can constitutionally confer and withdraw any title or dignity within Perak State at his absolute discretion. Even though the Senate made a decision to have the applicant impeached and degraded under art. 54(1), it was the Sultan's absolute personal discretion to do so as it involved 'title and dignity' within the ambit of art. 25. The court was further of the view that the Sultan could degrade a person's title even without the Senate's impeachment proceedings by virtue of his royal prerogative power. Since the final decision to degrade the applicant was exercised *via* royal prerogative, it was non-justiciable. (paras 21 & 25)

(6) It is trite law that prerogative remedy of *certiorari* applies to the actual decision handed down by a court or tribunal. It is not available to quash a decision which was in the form of recommendation or advice to the Sultan under art. 54(1). Furthermore, such a decision is private or domestic in nature and therefore not eligible for judicial review. (para 26)

(7) The respondents were incorrectly cited as parties as they were not a public body administering public law entailing exercise of power to make a decision which adversely affected the applicant such that it could have attracted a leave application for an order of *certiorari*, as this was a matter involving royal prerogative powers. (para 28)

[Order accordingly.]

Case(s) referred to:

Broome v. Casell Co [1972] AC 1027 ***(refd)***

Chiow Thian Guan v. Superintendent of Pudu Prison & Anor [1983] 1 CLJ 278; [1983] CLJ (Rep) 92 FC ***(refd)***

Council of Civil Service Unions & Ors v. Min for the Civil Service [1984] 3 All ER 935 ***(refd)***

Goh Eng Hwa v. M/S Laksamana Realty Sdn Bhd [2004] 3 MLJ 97 ***(refd)***

Juraimi Husin v. Pardon Board, State of Pahang & Ors [2002] 4 CLJ 529 FC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Mohd Afsar Yunus v. Handal Utama Sdn Bhd [1995] CLJ 118 HC ***(refd)***

PP v. Soon Seng Sia Heng & Other Cases [1979] 1 LNS 81 FC ***(refd)***

Ravindran P Muthukrishnan v. Malaysian Examination Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***

Salt Union v. Brunner [1900] 2 KB 822 ***(refd)***

Sharifah Aini Syed Jaafar v. Karangkraf Sdn Bhd [1989] 2 CLJ 1269; [1989] CLJ (Rep) 467 HC ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 38(1)(a)

Federal Constitution, arts. 7(1), 42(1), 71(1), 181(2)

Perak Constitution, arts. X, XXV, LIV(1)(d), LVI(1), LXII, LXIII, LXIV, LXVII

Rules of the High Court 1980, O. 53 rr. (1)(1), (2)(2), (3)(2), (5)

Other source(s) referred to:
Sir William Wade and Christopher Forsyth, *Administrative Law*, 7th edn, Clarendon Press, Oxford, p 248

For the applicant - Selvam Shanmugam; M/s Selvam Shanmugam & Partners
For the respondents - Dato' Ahmad Kamal Md Shahid; State Legal Advisor
For the AG's Chambers - Datin Hj Azizah Nawawi SFC

Reported by Anne Khoo

JUDGMENT

Abdul Kadir Musa J:

[1] This application ("encl. (1)") filed on 4 November 2006 by the applicant, YAM Raja Dato' Seri Haji Izzuddin Iskandar Shah Ibni Almarhum Sultan Idris A'fifullah Shah, was for leave under O. 53 r. (1)(1) of the Rules of the High Court 1980 ("the 1980 Rules"). The leave is for an order of *certiorari* under O. 53 r. (3)(2) of the 1980 Rules for the purposes of quashing the impeachment proceedings and its decision of 25 November 2006 under art. LIV(1)(d) ("art. LIV(1)(d)") second part of The Laws Of The Constitution of Perak ("Perak Constitution") by the Dewan Negara Perak ("the Dewan") affecting the applicant as the holder of the title of "Raja Kecil Besar Perak" prior to the aforesaid decision. It was also for an order:

(1) to set aside the Dewan's decision of 12 October 2006 in respect of the same subject matter;

(2) a declaration under O. 53 r. (2)(2); and

(3) as an alternative, for a stay of proceedings under O. 53 r. (3)(5).

[2] The grounds of the applicant's application are set out at p. (3) of the encl. (1) as explained in the relevant paragraphs of his supporting affidavit *vide* encl. (2). The nett effect of all the grounds relied upon is that, the said impeachment proceedings by the Dewan was and is in conflict with art. 7 of the Federal Constitution ("the Constitution") as reflected by the first item of encl. (1)'s intitulment. His explanation to it, as contained in paras. (4) - (8) of encl. (2), in gist, is that he should not be so impeached and degraded as para. (d) to art. LIV(1) of the Perak

Constitution was enacted to have a retrospective effect. As there was then no such para. (d) on 27 March 1990, the date the applicant was adjudged a bankrupt, it is therefore his contention that he was and is shielded from such an impeachment by virtue of art. 7, of the Constitution.

[3] Notwithstanding the above, it is not disputed by all parties concerned that:

(i) the applicant was, till 14 June 2007, still an undischarged bankrupt; and

(ii) no prior or "previous sanction" of the official assignee was obtained by the applicant within the legislative intention of s. 38(1)(a) of Bankruptcy Act 1967 ("the 1967 Act").

That being so, he is therefore undoubtedly an "incompetent person" to file encl. (1) application by virtue of the said s. 38(1)(a) unless, his action was "... an action for damages in respect of an injury to his person.". Section 38(1)(a) of the 1967 Act provides:

> (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.
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> (Emphasis, added).

[4] From the relevant facts before me, there was no evidence at all that the applicant was and is praying for claim for "an action for damages" even though it was agreed by all parties concerned that the applicant "... (was injured) to his person" within the context of the said s. 38(1)(a). Orders of:

(1) quashing the decision of 25 November 2006 aforesaid; and or

(2) setting aside of the said decision and also that of 12 October 2006; and or

(3) "declaration" that the applicant should still be the lawful holder of the title "Raja Kecil Besar Perak"; and or

(4) To "stay" the decisions of 10 October 2006 and 26 November 2006,

A are, with the greatest of respect to the learned counsels for the applicant, not claim arising from "an action for damages in respect of an injury to (the applicant)". In that context, both the cases of:

B (1) *Sharifah Aini Syed Jaafar v. Karangkraf Sdn Bhd* [1989] 2 CLJ 1269; [1989] CLJ (Rep) 467 HC: and

(2) *Mohd Afsar Yunus v. Handal Utama Sdn. Bhd.* [1995] CLJ 118 HC,

C could not provide either any assistance or support to the applicant's application.

[5] In (1) above, the plaintiff was adjudicated a bankrupt after she had effectively instituted a defematory suit against the D defendant; but not so in the instant application. Secondly the said action of hers, it was a claim of a personal nature for damages for injury to her reputation. That "injury to her reputation" can aptly be equated to " ... an injury to (her) person" within the ambit of s. 38(1)(a) of the 1967 Act. There was no claim for such E "damages" in encl. (1) application. The "damage" that should be claimed by the applicant must be in the nature of "... the pecuniary compensation obtainable by success in action ..." as stated by Lord Hailsham in *Broome v. Casell Co.* [1972] AC 1027. That type of claim is undisputably absence in encl. (1) application. F If at all there is any, it is my humble and considered view that, it is in that nature of *Damnum absque injuria* which means simply "a hurt or inconvenience which inflicts no actionable wrong or damage" as demonstrated, in principle, in the case of *Salt Union v. Brunner* [1900] 2 KB 822, which may have explained why the G applicant did not claim such "damages".

[6] In the said *Afsar*'s case, it was held that, "the claim for arrears of salary" as "damages" flowing from a breach of contract of employment could not be construed as eguivalent to "... an H action for damages in respect of injury to the person or (injury to reputation as in the case of (1) aforesaid)" within the meaning of s. 38(1)(a) of the 1967 Act. As such, without obtaining prior sanction of the official assignee before proceeding with any action, the plaintiff has no *locus standi* to file the writ of summons in I question for he was clearly an undischarged bankrupt. Similarly by

comparative analogy, since it is not disputed that the applicant was still an undischarged bankrupt as on 14 June 2007, he too as the plaintiff in the aforesaid *Afsar*'s case has no *locus standi* then to file his encl. (1) application.

[7] The issue of *locus standi* was held by Hamid Mohamad FCJ (as he then was) at p. 98 in *Goh Eng Hwa v. M/S Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97 that, it was not just "a formality" but it goes to the "capacity" of the intended litigant. Attaching myself to what was said by His Lordship, I firmly hold that without such "capacity", the court has therefore neither the necessary jurisdiction to hear any application for leave for an order of *certiorari* nor can it assumed such a jurisdiction to do so; the application by the applicant, *vide* encl. (1) is no exception. Without it, the question of whether the application for an order of *certiorari* had merit or not is irrelevant. I find support for my said conclusion in the case of *Ravindran P Muthukrishnan v. Malaysian Examination Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC.

[8] In the said *Ravindran*'s case, Hashim Yeop Sani, FC in dismissing the appeal held that the trial judge was right in rejecting the reasons for the 13 days delay. Thus, since the application in the notice of motion itself was out of time, it was not properly before the court, and the court therefore has no jurisdiction to entertain application for leave for an order of *certiorari*. By "comparative conceptual analogy", an undischarged bankrupt by virtue of s. 38(1)(a) of the 1967 Act who is "... incompetent to maintain any action (including encl. (1) application by the applicant)" equally has no parallel "capacity" as the applicant in the said *Ravindran*'s case; and *Mersing Omnibus Co. Sdn. Bhd. v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 226, implicited.

[9] Be that as it may, the applicant conspicuous passive act in not making any attempt to apply for the necessary sanction from the oficial assignee for the purposes of filing encl. (1) application further add "salt to the injured wound" of the applicant's "incompeten(cy) to maintain any action... "in the context s. 38(1)(a) of the 1967 Act. There was not a single positive step initiated by the applicant to write to the official assignee for such a sanction. If that was done, and should he received a positive reply to that after the permitted time to file for leave under O. 53

A r. (1) of the 1980 Rules he could then, before filing encl. (1) application, apply to the court for an extension of time to enable him to file the said application after the permitted time frame to do so. On the other hand, if the required answer from the official assignee was not favourable to him or there was no response at B all from the official assignee, then and only then, he can equitably able to apply to the court for the exemption of the aforesaid sanction, and or, if necessary, also for extension of time to file the said encl. (1) application; but not before that. As such, I strongly hold that, it is wrong for the applicant to apply the aforesaid 5th C relief in the encl. (1) application under O. 53 r. 3 of the 1980 Rules.

[10] The hurdle of "capacity" to warrant invoking the court's jurisdiction must first be overcome before filing encl. (1) D application. It should be done separately by annexing the intended encl. (1) application thereto as one of its exhibits. In that respect such an application for "previous sanction" spoken of by s. 38(1)(a) of the 1967 Act is certainly not an application that will entail the necessity of the court, in appropriate cases, to E subsequently issue any of the prerogative orders such as that of certiorari to quash any decision of any public body.

[11] On the premises of the discussion above alone, due to the applicant's lack of "capacity" in invoking the court's jurisdiction, the applicant by his own failure to apply separately as suggested F above has himself given me a compellable correct platform to dismiss his application without even having to consider into the merit of his leave application which formed the crux of encl. (1) application.

G **[12]** Be that as it may, closer evaluation of the 4th relief sought also suffers the same faith as the 5th relief aforesaid. The main reason to it in gist is that, the degradation has been made after the impeachment proceedings has taken place. Such relief could only be made possible and available if such a proceedings is either H still in progress or about to take place, and or the "command of degradation" has not yet been effected; but not otherwise.

[13] Notwithstanding the above, and still not going into the merit of encl. (1) application, the 5th heading of its intitulment has, to I the detriment to the applicant, gives the court yet another justifiable ground to refuse encl. (1) application without having to consider the question of the issuance of the leave for an order of *certiorari*. The said heading provides:

Dalam **Fasal 63 dan 64** Peraturan Fasal-Fasal Bahagian Pertama, Undang-Undang Tubuh Kerajaan Negeri Perak.

(Emphasis added).

"Fasal 63" or "art. LXIII" states:

LXIII. Special jurisdiction of the Federal Court as to the interpretation of the Laws of The Constitution

Without prejudice to any appellate or revisional jurisdiction of the Federal Court, where in any proceedings before another Court (**High Court** inclusive), a question arises as to the effect of any Article in the Laws of the Constitution or any part thereof, the Federal Court **may**, **on** the application of either party to the proceedings, **determine that question and either dispose of the case or remit it to the other Court to be disposed of** in accordance with the determination.

(Emphasis added)

and art. LXIV, *inter alia*, states:

LXIV. Advisory jurisdiction of Federal Court

His Royal Highness **may** refer **to** the Federal Court for its opinion any question **as to the effect** of any provision of this Constitution which has arisen or appears to His Highness likely to arise, ..." (Emphasis added).

It is crystal clear that both the said art. LXIII and art. LXIV speak of "special" and "advisory" jurisdiction of the Federal Court. They have nothing to do with aforesaid leave application. Even though the said art. LXIII speaks of "special jurisdiction" of the Federal Court, it must be initiated by and "... on application of either party to the proceedings, ..." in order to invoke that "special jurisdiction" of the Federal Court. It is only upon such application that the Federal Court may assume the necessary jurisdiction, but not otherwise. "... (E)ither party to the proceedings, ..." referred thereto, in the instant case, is either the applicant himself or any of the two cited respondents of encl. (1) application. There was no such formal and proper application to do so by either of them. If there is no intention by the applicant to do so, then it should not be so cited as an intitulment for it has nothing to do with the intended leave application.

A **[14]** On the other hand, by citing the aforesaid art. LXIV as part of the intitulment to encl. (1) application, two obvious inferences can justifiably be drawn. They are:

(1) the applicant, by such inclusion, recognizes the presence of the
B "prerogative power(s)" of His Royal Highness in the context of the Perak Constitution, such as;

(2) His Royal Highness' right "... to refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution ... ." .
C

Such right of His Royal Highness truly does exist and is clearly expressed in art. LXII of the 1st part of the Perak Constitution. That article states:

D LXII. Prerogative of His Royal Highness reserved.

Except as express herein, this part shall **not** affect the **prerogatives**, powers **and** jurisdiction **of** His Royal Highness.

(Emphasis added).

E Again, the said art. LXIV has nothing to do with leave application intended by encl. (1). It should not have been cited as part of encl. (1) application's intitulment. By such inclusion, I would construe that the applicant is asking the court to direct His Royal
F Highness to refer the applicant's encl. (1) application to the Federal Court in accordance with the said art. LXIV; an absurd suggestion indeed. That being my conclusion, this court should not allow it to be used as a public platform for canvassing such a request from whosoever he may be to be entertained.

G **[15]** I have demonstrated above that, the presence of a number of fatal "substantive procedural defects", would have enabled me to justifiably dismiss encl. (1) application without having to go into the merits of the issuance of leave itself. However to avoid any possible criticism by taking that course of action, it is therefore my
H considered opinion that it would be a matter of judicial prudence that, if encl. (1) should be dismissed, it should be so done on its merit and avoid procedural defect(s). For that, my humble analysis of its merits is as below.

I **[16]** It is an undisputed fact that we inherited our common law from English common law. Before such common law evolved to its present day status, it was then the law of the land that, "The

King can do no wrong" for he was "the law of the land." As time goes by, such absolute powers of the King, on His own volition or by force circumstances, became diluted and or eroded in that they were transmitted and exercisable by the Crown through the State agencies. Thus prerogative powers of issuing writs (later metamorphosized into "orders") of *certiorari*, *mandamus*, prohibition, and *habeas corpus* are four such examples. They were once in the prerogative realm of the Sovereign which are now vested with the Civil Court of Law of any Common Law Country. Though such is substantially the situation, certain prerogative powers remain intact with the Sovereign and can only be exercised by him personally. The same applies to Malaysia; and Perak is no exception. Those remain intact with the Sovereign are also styled as "Royal Prerogatives" (and rightly so termed) as oppose to "prerogative powers" of issuing "prerogative orders" such as *certiorari* and *mandamus* by the court.

[17] Sir William Wade and Christopher Forsyth in the book, "*Administrative Law*", 7th edn. Clarendon Press, Oxford, at p. 248, defined "prerogative" power as a "legal power which appertains to the Crown but not to its subjects." It is thus obvious it is "personal" in nature to the Sovereign and should therefore be exercisable by him alone and only him. They found their support which they quoted, at the same page, of what Blackstone explained as to the correct use of the term "prerogative" power as:

> ... signify(ing), in its etymology (from prae and rogo) something that is required or demanded before or in preference to, all others. And hence it follows, that it must be in nature singular and eccentrical: that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative.

Such a power tantamount to "absolute power" exercisable by the Sovereign personally. "How?" and "Why?" such power is exercised, if so exercised, cannot be questioned in ordinary Court of law as it is being non-justiciable. Creating a peer or granting an honour are examples of exercising of such "Royal Prerogatives".

[18] In the case of *Council of Civil Service Unions & Ors v. Min for the Civil Service* [1984] 3 All ER 935, at 956, paras. (d) - (e) - Lord Roskill, in respect of "prerogative powers" that are not susceptible to judicial review, said as follows:

> ... Prerogative powers such as those relating to the making of treaties, the defence of the realm, the **prerogative of mercy**, **the grant of honours**, ... are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to judicial process.
>
> (Emphasis, added).

The non-justiciability in respect of "prerogative of mercy" is entrenched in art. 42(1) of the Constitution and is well explained in the case of *Juraimi b. Husin v. Pardon Board, State of Pahang & Ors* [2002] 4 CLJ 529. There an abundant authorities in line and in consonant with the said *Juraimi*'s case such as:

(1) *PP v. Soon Seng Sia Heng & 9 Other Cases* [1979] 1 LNS 81 FC;

(2) *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC: and

(3) *Chiow Thian Guan v. Superintendent of Pudu Prison & Anor* [1983] 1 CLJ 278; [1983] CLJ (Rep) 92 FC

are three amongst such cases.

[19] From the analysis above, it is therefore very clear that:

(i) in common law; or

(ii) by being entrenched in a particular State's Constitution (in the present application, the Perak Constitution),

a particular "act of exercising a power" having the characteristic of "a Royal Prerogative" historically or statutorily guarded or created "Royal Prerogative" should and can only be exercised by Sovereign personally. However such "prerogative power" by the Sovereign is certainly non-justiciable. It should be non-justiciable *ab abinitio*, as reflected by art. 181 of the Constitution.

Article 181 of the Constitution provides: A

> 181. (1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers ... as hitherto had and enjoyed shall remain unaffected. B
>
> (2) No proceedings whatsoever shall be brought against the Ruler of a State in his personal capacity except in the Special Court established under Part XV.
>
> (Emphasis added). C

Such "constitutional immunity" is further enhanced by art. 71(1) of the Constitution. The said art. 71(1) provides:

> (1) The Federation shall guarantee the right of the Ruler of a state to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that state in accordance with the Constitution of that state: ... D
>
> (Emphasis added).

Such " prerogative powers or rights" of His Royal Highness of the State of Perak recognised by art. 71(1) of the Constitution are entrenched in art. X of the second part of the Perak Constitution. E

The Art. X aforesaid state: F

> X. **In** amplification and not in derogation of the Royal Prerogatives hitherto possessed or exercised by the Sovereign **the following Royal Prerogatives among others are vested in the Sovereign**:
>
> (a) **The Fountain of Honour**, G
>
> ... .
>
> (Emphasis added).

The employment of the words "... in the Sovereign:" obvious can notes "a singular nature" as used by Blackstone referred to above earlier, and is thus personal to His Royal Highness. As such, only His Royal Highness can confer any title and dignity within Perak State as prescribed by art. XXV, same Part of the Perak Constitution. H I

[20] The said Art. XXV, *inter alia* provides:

> XXV. The Sovereign is the fountain of all honours and dignities within the State and He alone may confer titles and dignities ... whether such titles, dignities, ... have or have not been previously conferred or instituted:
>
> Provided, ... before any new title, dignity ... is created or any appointment to such title or dignity is made, the advice of the Dewan Negara should be sought, and, if (it) will involve expenditure out of the revenue of the State, such expenditure shall require the approval of the (State Legislative Assembly).

The presence of the words "He alone" in the said art. XXV conclusively empowered only His Royal Highness ("H.R.H.") constitutionally the "Royal Prerogative Power" to confer any "title" and any "dignity" within the state to any person H.R.H. deemed suitable and proper to receive such a "title" or "dignity". Whether or not to exercise that "power" is at H.R.H.'s personal absolute discretion as reflected by the words "may confer" in same article. The proviso to this article. only applies to "intended newly created 'Honours and Dignities' " which is not at all in issue in respect of encl. (1) application. The exercise or non-exercise of such "Royal Prerogative Power" has been demonstrated above to be non-justiciable. It follows therefore the question of the issuance of leave for an order of *certiorari* as per encl. (1) can never be applied for in ordinary court of law (art. 181(2) bears relevance).

[21] Having decided such, the consequential pertinent question is: "Does impeachment and Degradation under art. LIV(1)(d). Second Part of the Perak Constitution requires exercise of 'Royal Prerogative Power' by H.R.H.?". That, I will next endeavour to elucidate.

[22] The aforesaid art. LIV(1)(d), *inter alia*, states:

> LIV(1). The Sovereign, with the consent of the Dewan Negara may, after impeachment in that Dewan, degrade any person upon whom any title, dignity ... has been conferred ... if sufficient fault or offence has been committed so as to make such degradation just and expedient ... WE expressly declare that the following shall be deemed to be sufficient fault or offence:

(a) ...; A

(b) ...;

(c) ...,

(d) being an undischarged bankrupt. B

(Emphasis added).

[23] My quick reading of the said art. LIV(1) convinced me without any doubt whatsoever that, at the end of the day, it will be up to H.R.H. to make the final "decision". Even though, C rightly or wrongly the Dewan Negara made their decision to have the applicant "impeached and degraded" under the said article, it would be to H.R.H.'s absolute discretion to so "impeached and degraded" the applicant by the presence of the word "may" before the words "after impeachment ..." in the article. The right to D oppose such decision of the Dewan is provided by article. LXVII, Second Part of the Perak Constitution. That decision of the Dewan certainly involves the "title and dignity" of the applicant within the ambit of the aforesaid art. XXV. Since it involves "Royal Prerogative" the "degradation" has to be done by H.R.H.'s E personally, and is non-justiciable. Whether or not the applicant has merit or otherwise on the substantive motion of *certiorari* is irrelevant. Without leave, there will be no order of *certiorari*.

[24] It is interesting to note that the aforesaid art. LIV speaks of F the words "... after impeachment...". It is silent on whether H.R.H. ("The Sovereign") can "degrade" without such "impeachment proceedings in the Dewan.". I am strongly inclined to hold that H.R.H. is perfectly and absolutely able to do so by virtue of His "Royal Prerogative Power" under the heading of G "The Fountain of Honour.".

[25] From the above, it is my humble and considered opinion, whether or not, by the very nature of H.R.H. being vested personally with such "Royal Prerogative Powers" he can therefore H constitutionally "confer" and "withdraw" any "title" and or "dignity" within His State at H.R.H.'s absolute discretion. Thus, the basis of the Dewan decided to advise H.R.H. to impeach and degrade the applicant based on para. (d) the said art. LIV(1) has no bearing as to "how?" or "when?" H.R.H. should or should not I exercise any of the entrenched "Royal Prerogative Powers" vested constitutionally in H.R.H. personally.

[26] In the above context, it is very important to distinguish between the actual "decision" of H.R.H. agreeing with "the decision of the Dewan" in the form of "an advice" with regard to the said impeachment proceedings advising H.R.H. to degrade the applicant. It is trite law that prerogative remedy of *certiorari* applies to the "actual decision" as that handed down by an Industrial Court as, for example, in the case of *Tuan Hj. Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627 SC. It is not available to quash the "decision" of any body in the form of "recommendation" such as in the aforesaid case of *Juraimi*, *supra*, or by similar analogy to "advice" to H.R.H. under art. LIV(1), second part of the Perak Constitution. Since the final "decision" to "degrade" the applicant has to be exercised by H.R.H. himself via "Royal Prerogative", it therefore non-justiciable. Further, such decision is "private" or "domestic" in nature (see *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927, whereby it was held that corporation so established though involved "public interest" could not get judicial review for being "private in nature") which prerogative remedy of *certiorari* refuses to entertain; this application is no exception but similar in nature. His R.H. or the Dewan is certainly not a "public body" that will attract an order of *certiorari* to quash such a "decision". Thus, whether or not the applicant has a *prima facie* case at the actual hearing of the substantive motion of *certiorari* is irrelevant. This is because the required leave *vide* encl. (1) application could not and should not be granted in the first place at this stage.

[27] Be that as it may, it was contended on behalf of the applicant that the retrospective effect of para. (d) of the aforesaid art. LIV(1) should not affect him by virtue of art. 7 of the Constitution. The said art. 7 states as follows:

> 7. (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
>
> (2) A person who has been acquitted or convicted of the offence shall not be tried again for the same offence ...".

With the greatest of respect to the learned counsels for the applicant, such contention has no substratum at all in relation to this application. If one looks at the side heading of art. 7 of the Constitution, it speaks of:

> Protection against retrospective criminal laws and repeated trials (of criminal offences).

which has nothing to do with civil laws. The 1967 Act, is a civil law and it is an established principle that retrospective legislations do not encompass civil laws. Microscopic dissection of all the relevant provisions (example s. 38(1) of the 1967 Act) enabled me to firmly conclude that "being a bankrupt" is not an offence involving "an act" or "omission" envisaged by the said art. 7(1). As such, I conclude that the said article has no application to the encl. (1) application.

[28] Lastly, I will fail to fully discharge my duty if I will not consider whether or not either or both the respondents was or were correctly cited. Having discussed above, and I am very positive if the learned counsels for the applicant were vigilant with the "impact and implication" of "Royal Prerogative Powers" they may perhaps advised the applicant to reconsider whether or not to proceed with his application. From my analysis above, both the respondents should not have been cited. They were not the "public body" administering "public law" entailing their exercise of their power to make a "decision" which "has adversely affected" the applicant that may have attracted leave application for an order of *certiorari* to quash such a "decision".

[29] On the premises above, the applicant's encl. (1) application is hereby dismissed with costs.